BALAMURUGAN NAGARAJU A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
LINTON ALBERT JCA
MOHTARUDIN BAKI JCA
MOHD ZAWAWI SALLEH JCA
[CRIMINAL APPEAL NO: N-05-459-2010]
8 APRIL 2013 C

CRIMINAL LAW: *Murder - Defence - Intoxication - Whether accused in complete and absolute state of intoxication - Whether accused in complete and absolute state of intoxication - Whether capable of forming intention - Whether conduct before and after commission of murder defeated defence - Penal Code, s. 86(2)* D

EVIDENCE: *Circumstantial evidence - Inferences from facts - Murder - Whether circumstantial evidence pointed to accused's guilt - Whether intention to kill proved by nature of medical evidence and weapon used - Whether accused's confession voluntarily made and rightly admitted in evidence - Penal Code, s. 300(a) - Evidence Act 1950, s. 17(2)* E

The appellant ('the accused') was convicted and sentenced to death by the High Court on a charge of murdering a woman ('the deceased'), an offence under s. 302 of the Penal Code ('Code'). F According to the evidence adduced by the prosecution, the deceased's daughter ('SP7'), was awakened in the middle of the night by the deceased's screams. She went to check and saw the accused standing in front of her mother's bedroom holding the deceased's handbag and an axe. When confronted the accused, G she threw the axe towards a sofa and attacked SP7 but fled when SP7 started screaming for help. SP7 found her mother lying in a pool of blood. The deceased was then taken to hospital but died the same day of severe head injuries caused by blunt trauma. Altogether, the deceased had 11 injuries on her body. Shortly H after the murder, the accused had repeatedly telephoned his friend ('SP4') to take him to Seremban 2 and during their conversation the accused had admitted to SP4 that he had attacked the deceased. In his appeal to the Court of Appeal against the conviction and sentence, the accused, *inter alia*, submitted that the I

A prosecution's failure to adduce evidence of his fingerprints or DNA profile on the axe was fatal to its case and that the trial judge had not only given undue weight to his 'confession' to SP4 but also failed to adequately consider his defence of intoxication.

B **Held (dismissing appeal and affirming conviction and sentence)**
Per Mohd Zawawi Salleh JCA delivering the judgment of the court:

C **(1)** There was sufficient circumstantial evidence to prove the nexus between the accused and the deceased's death – SP7's evidence of seeing the accused standing outside the deceased's room holding the deceased's handbag and axe and his throwing of the axe towards the sofa; SP4's evidence that the accused had called him repeatedly for help and his confession that he had attacked the deceased; the finding of the deceased's handbag, jewellery, bank book and other personal belongings on the accused and the finding of a cigarette butt at the scene by the forensic team, the DNA profile on which matched the appellant's. (para 20)

E **(2)** In view of the nature of the medical evidence and the weapon used, the present case fell squarely within s 300(a) of the Code. In the absence of anything else, the accused in inflicting the blows must have intended to kill the deceased. (para 23)

F **(3)** The failure to lift fingerprints or trace the DNA profile on the axe would be significant if the identity of the culprit was in question. However, the identity of the accused as the perpetrator of the crime was not in doubt. The accused was seen carrying the axe before throwing it at the sofa and SP8 and SP10 also confirmed that the axe was found on the sofa. (paras 24, 25 & 26)

H **(4)** The trial judge rightly admitted the accused's statement to SP4 that he had attacked the deceased as a confession under s. 17(2) of the Evidence Act 1950 after finding that it was made voluntarily. The accused failed to show that the confession was involuntarily given. The statement, taken as a whole without reference to extrinsic facts, suggested the inference that the accused committed the offence. The statement was corroborated by evidence that he was seen

carrying the deceased's handbag and an axe, the finding of the deceased's personal belongings on him and his calling SP4 almost 20 times for transport to Seremban 2. (paras 28, 29, 31 & 33)

(5) The accused's defence of intoxication under s. 86(2) of the Code failed. For the defence to succeed the accused had to be in such complete and absolute state of intoxication that he was incapable of forming the intention as charged. However, his conduct immediately before and after the crime did not show him to be in such a state. He had ridden from Kajang to Bukit Kepayang, then to Seremban 2 and finally back to the deceased's house at Mambau without getting involved in an accident. He had also remembered that the deceased had promised to lend him money. After the commission of the offence he had taken the deceased's handbag, attacked SP7 and called SP4 for help. All this could not have been conceived if he was intoxicated. (paras 36, 38 & 39)

Bahasa Malaysia *Translation Of Headnotes*

Perayu ('tertuduh') telah disabitkan kesalahan dan dijatuhkan hukuman mati oleh Mahkamah Tinggi atas tuduhan membunuh seorang wanita ('si mati') suatu kesalahan di bawah s. 302, Kanun Keseksaan ('Kanun'). Menurut keterangan yang dikemukakan oleh pihak pendakwaan, anak perempuan si mati, ('SP7'), telah dikejutkan pada tengah malam oleh jeritan si mati. Dia kemudian pergi memeriksa dan melihat tertuduh berdiri di hadapan bilik tidur ibunya sambil memegang beg tangan si mati dan sebilah kapak. Apabila berdepan dengannya tertuduh melemparkan kapak tersebut ke arah sofa dan terus menyerang SP7 tetapi melarikan diri apabila SP7 menjerit meminta tolong. SP7 mendapati ibunya terbaring berlumuran darah. Si mati telah dibawa ke hospital tetapi meninggal dunia pada hari yang sama akibat kecederaan kepala yang teruk disebabkan oleh trauma tumpul. Si mati mempunyai 11 kecederaan di badannya. Tidak lama selepas pembunuhan tersebut, tertuduh berkali-kali menelefon kawannya, SP4, untuk membawanya ke Seremban 2 dan semasa perbualan mereka, tertuduh telah membuat pengakuan kepada rakannya ('SP4') bahawa dia telah menyerang si mati. Dalam rayuannya kepada Mahkamah Rayuan terhadap sabitan dan hukuman, tertuduh,

A antara lain, menghujahkan bahawa kegagalan pihak pendakwaan untuk mengemukakan keterangan cap jari atau profil DNAnya pada kapak tersebut menjejaskan kes dan hakim bicara bukan sahaja tidak memberikan pertimbangan yang wajar atas 'pengakuan' tertuduh kepada SP4 tetapi juga gagal mempertimbangkan
B pembelaan mabuk dengan sewajarnya.

Diputuskan (menolak rayuan dan mengesahkan sabitan dan hukuman)
Oleh Mohd Zawawi Salleh HMR menyampaikan penghakiman
C **mahkamah:**

(1) Terdapat keterangan ikut keadaan yang mencukupi untuk membuktikan kaitan antara tertuduh dengan kematian si mati – keterangan SP7 yang melihat tertuduh berdiri di luar bilik si mati sambil memegang beg tangan si mati dan sebilah kapak
D dan lemparan kapak tersebut ke arah sofa; keterangan SP4 bahawa tertuduh telah menghubunginya berulang kali meminta pertolongannya dan pengakuan bahawa dia telah menyerang si mati; penemuan beg tangan si mati, barang kemas, buku bank dan barangan peribadi lain tertuduh dan penemuan puntung
E rokok di tempat kejadian oleh pasukan forensik, yang mana profil DNAnya padan dengan perayu.

(2) Melihat pada sifat keterangan perubatan dan senjata yang digunakan, kes ini jatuh tepat di bawah s. 300(a) Kanun.
F Dengan ketiadaan apa-apa yang lain, tertuduh dalam mengenakan pukulan semestinya bertujuan untuk membunuh si mati.

(3) Kegagalan untuk mengambil cap jari atau mengesan profil DNA
G pada kapak tersebut hanyalah penting jika identiti pelakunya dipersoalkan. Namun begitu, identiti tertuduh sebagai pelaku jenayah tidak diragui. Tertuduh telah dilihat memegang kapak sebelum melemparkannya ke sofa dan SP8 dan SP10 juga mengesahkan bahawa kapak tersebut ditemui di sofa.

H

(4) Hakim bicara telah dengan tepat menerima penyataan tertuduh kepada SP4 bahawa dia telah menyerang si mati sebagai pengakuan di bawah s. 17(2) Akta Keterangan 1950 selepas mendapati bahawa ia dibuat secara sukarela. Tertuduh gagal
I menunjukkan bahawa pengakuan tersebut dibuat secara paksa.

Penyataan tersebut, dipertimbangkan secara keseluruhan tanpa merujuk kepada fakta-fakta luaran, mencadangkan kesimpulan bahawa tertuduh melakukan kesalahan tersebut. Penyataan tersebut disokong oleh keterangan bahawa dia telah dilihat membawa beg tangan si mati dan sebilah kapak, penemuan barangan peribadi si mati padanya dan menghubungi SP4 hampir 20 kali untuk membawanya ke Seremban 2.

(5) Pembelaan mabuk oleh tertuduh di bawah s. 86(2) Kanun gagal. Bagi membolehkan pembelaan tersebut berjaya, tertuduh mestilah berada dalam keadaan mabuk sepenuhnya hinggakan dia tidak mampu membentuk niat seperti yang dituduh. Walau bagaimanapun, tindakannya sebelum dan selepas jenayah tersebut tidak menunjukkan dia berada dalam keadaan sedemikian. Dia telah menunggang dari Kajang ke Bukit Kepayang, kemudian ke Seremban 2 dan akhirnya kembali ke rumah si mati di Mambau tanpa terlibat dengan kemalangan. Dia juga teringat bahawa si mati ada berjanji untuk memberi pinjam wang kepadanya. Selepas pelakuan jenayah tersebut, dia telah mengambil beg tangan si mati, menyerang SP7 dan menghubungi SP4 untuk mendapatkan bantuan. Semua ini tidak dapat dilakukannya sekiranya dia mabuk.

Case(s) referred to:

Abdul Aziz Mohamed Shariff v. PP [2010] 5 CLJ 733 FC ***(refd)***
Chan Chwen Kong v. PP [1962] 1 LNS 22 CA ***(refd)***
Chan Kwee Fong v. PP [2010] 3 CLJ 671 CA ***(refd)***
Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***
Francis Antonysamy v. PP [2005] 2 CLJ 481 FC ***(refd)***
Hasibullah Mohd Ghazali v. PP [1993] 4 CLJ 535 SC ***(refd)***
Ho Sek Kong v. PP [2011] 6 CLJ 522 CA ***(refd)***
Joseph v. State of Kerala [2000] 5 SCC 197 ***(refd)***
Juraimi Husin v. PP [1998] 2 CLJ 383 CA ***(refd)***
Lorensus Tukan v. PP [1987] 1 LNS 150 SC ***(refd)***
Magendran Mohan v. PP [2011] 1 CLJ 805 FC ***(refd)***
Mazlan Othman v. PP [2013] 1 CLJ 750 CA ***(refd)***
PP v. Badrulsham Baharom [1987] 1 LNS 72 HC ***(refd)***
PP v. Mansor Md Rashid & Anor [1997] 1 CLJ 233 FC ***(refd)***
R v. Sang [1979] 2 All ER 1222 ***(refd)***
Sainal Abidin Mading v. PP [1999] 4 CLJ 215 CA ***(refd)***
Tham Kai Yau & Ors v. PP [1976] 1 LNS 159 FC ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 17(2)
Penal Code, ss. 85, 86(2), 300, 302

For the applicant - Nik Mohamed Ikhwan Nik Mahamud; M/s Nik Ikhwan & Co
For the respondent - Diar Isda Yazmin Ismail; DPP

[Editor's note: For the High Court judgment, please see Balamurugan Nagaraju v. PP [2013] 1 LNS 164]

Reported by Ashok Kumar

JUDGMENT

Mohd Zawawi Salleh JCA:

The Antecedents

[1] The appellant was charged with the following offence:

> Bahawa kamu pada 16 Ogos 2008 jam lebih kurang 12.40 pagi di rumah No. 299, Lorong 7, Taman Kelab Tuanku Mambau, di dalam daerah Seremban, di dalam negeri Negeri Sembilan dengan niat membunuh dan telah menyebabkan kematian kepada Gantimadi A/P Kanaganinkam, KPT NO: 650615-06-5236, dengan itu kamu telah melakukan suatu kesalahan di bawah s. 302 Kanun Keseksaan dan boleh dihukum di bawah peruntukan yang sama.

[2] The appellant was tried at the Seremban High Court. At the end of defence case, the appellant was convicted and sentenced to death. Aggrieved by the learned trial judge's decision, the appellant now appeals to this court.

[3] The conviction and sentence of the appellant has been assailed on the following grounds:

(a) That the learned trial judge had misdirected himself when he failed to rule that the prosecution had failed to prove *prima facie* of murder;

(b) The absence of fingerprint and/or DNA evidence was fatal to the prosecution's case;

(c) That the learned trial judge placed too much reliance on SP4's evidence with regards to the appellant's confession; and

(d) The learned trial judge misdirected himself when he failed to appreciate the defence of intoxication.

[4] On the other hand, learned Deputy Public Prosecutor submitted that the prosecution had proved the guilt of the appellant beyond reasonable doubt and urged this court to affirm the conviction and sentence passed by the High Court and the appeal should be dismissed.

[5] We have heard learned counsel for the appellant and learned Deputy Public Prosecutor and have gone through the record available before us. There is no ground for us to interfere with the decision of the learned judge. We unanimously dismissed the appeal and affirmed the conviction and sentence passed by the High Court.

[6] We now give the reasons for our decision.

The Prosecution's Case

[7] The prosecution's key witness, Sri Naga Jothi (SP7) was the deceased's daughter. They were living at Mambau at the material time. On 16 August 2008, at about 12.30 am, SP7 was awaken by her mother's screaming. She sprinted through her bedroom door and saw the appellant standing in front of her mother's bedroom, holding her mother's handbag and an axe.

[8] SP7 confronted the appellant. The appellant thrown the axe towards the sofa and attacked SP7. He slapped her face and straggled her. SP7 cried for help and the appellant fled the scene.

[9] SP7 checked on her mother and found the deceased lying on the bed in a pool of blood. She went to her neighbour to seek help.

[10] At about 12.40am, Pani Selvam (SP4) received a call from the appellant in which the appellant asked SP4 to send him to Seremban two. SP4 refused as it was late. However, the appellant called SP4 again and told SP4 that he attacked the deceased.

[11] SP4 co-operated fully with the police during the investigation and led to the appellant's arrest.

[12] Meanwhile, the deceased was taken to Kuala Lumpur Hospital but was pronounced dead on the same day, at 6.15pm autopsy on the deceased's body was performed by the pathologists, Dr Mohd Shah bin Mahmood (SP6). He confirmed that there were 11 injuries on the deceased's head, body and forearm. The cause of death was 'severe head injury due to blunt trauma to the head'.

The Defence Case

[13] The appellant gave evidence on oath. He told the court that the deceased and he were having an extra-marital affair. On that day, he consumed a large amount of alcohol with his superior before he set off from Kajang to meet the deceased at Bukit Kepayang, Seremban. They later went to Seremban 2 before heading to the deceased's house.

[14] The deceased screamed at the appellant for drinking but the appellant reminded the deceased that she permitted it in the first place. The appellant later asked to borrow some money that the deceased had earlier promised to give it to him.

[15] The deceased went berserk and started to verbally abuse the appellant's six month old daughter. She accused them of incest. The appellant was angry but was able to control his temper. During the quarrel, the deceased had thrown her handbag at the appellant.

[16] The appellant said that the deceased attacked him with something. He did not know what happened later as he was drunk.

The Appellant's Appeal

Ground (A): There Is No Prima Facie Case Of Murder

[17] In the instant case, the prosecution has not claimed that the murder of the deceased was witnessed by anyone and no direct evidence regarding the same was adduced before the trial court. Admittedly, the whole case against the appellant rests on circumstantial evidence. The law relating to circumstantial evidence is well settled. Circumstantial evidence can be the sole

basis for a conviction provided that the conditions precedent before conviction on circumstantial evidence are fully established. The conditions are:

(a) The circumstances from which the conclusion of guilt is to be drawn should be fully established;

(b) The facts so established should be consistent with the hypothesis of the guilt of the accused;

(c) Circumstances should be of conclusive nature and tendency;

(d) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

[See *Magendran Mohan v. PP* [2011] 1 CLJ 805; [2011] 6 MLJ 1; *Mazlan Othman v. PP* [2013] 1 CLJ 750; [2013] 1 AMR 615; *Dato' Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101; *Chan Chwen Kong v. PP* [1962] 1 LNS 22].

[18] In *Joseph v. State of Kerala* [2000] 5 SCC 197, the court has explained under what circumstances conviction can be based purely on circumstantial evidence. It is observed, that:

> ... it is often said that though witness may lie, circumstances will not, but at the same time it must cautiously be scrutinised to see that the incriminating circumstances are such to lead only to a hypothesis of guilt and reasonably exclude every possibility of innocence of the accused. There can also be no hard and fast rule as to the appreciation of evidence in a case and being always an exercise pertaining to arriving at a finding of fact the same has to be in the manner necessitated or warranted by the peculiar facts and circumstances of each case. The whole effort and endeavour in the case should be to find out whether the crime was committed by the accused and the circumstances proved form themselves into a complete chain unerringly pointing to the guilty of the accused.

[19] It is clear from the case cited above that conviction can be based solely on circumstantial evidence but it should be tested on the touchstone of law relating to circumstantial evidence laid down by decided cases.

[20] Keeping in view the relevant principles governing a case based on circumstantial evidence, we propose to consider whether the case against the appellant is proved. In the instant case, having carefully examined the evidence, we are in agreement with the learned trial judge that there are sufficient circumstantial evidence that proved the nexus between the appellant and the deceased's death. The evidence may be summarised as follows:

(a) SP7 saw the appellant standing outside her room, holding the deceased's handbag and an axe;

(b) The appellant threw the axe on sofa;

(c) The appellant called SP4 repeatedly asking for help.

(d) The appellant's confession to SP4 that he attacked the deceased;

(e) The deceased's handbag, jewellery, bank book and other personal belongings were found on the appellant

(f) A cigarette butt was found at the scene by the forensic team. The DNA profile found on the cigarette butt matched the appellant.

[21] Intention or *mens rea* is not something capable of being established by direct evidence; it is a matter of inference. It could be gathered from all the facts and circumstances prevailing in the case. [See *Sainal Abidin Mading v. PP* [1999] 4 CLJ 215; [1994] 4 MLJ 497, *Tham Kai Yau & Ors v. PP* [1976] 1 LNS 159; [1977] 1 MLJ 174].

[22] In this regard, the appellant's intention may be gathered from the nature of the injuries and the weapon used. In the instant case, we found that the prosecution had established via the evidence by the pathologist (SP6) that:

(a) the cause of death is severe head injury caused by blunt trauma;

(b) the deceased suffered severe head injury and there was subarachnoid haemorrhage. The brain could be seen protruding out of the wound;

(c) the deceased's head was hit repeatedly;

(d) the injury would have been caused by violent blows; and

(e) the chances of survival to a human who sustained this kind of injury are very slim; and

(f) a weapon like an axe could cause such injury.

[23] In view of the nature of the medical evidence given by SP6, and the used of dangerous weapon, we are of the considered view that the present case would fall squarely within limb (a) of s. 300 of the Penal Code. In absence of anything else, the appellant who had inflicted these blows must have intended to kill the deceased. We are in agreement with the learned trial judge that the appellant intended the death of the deceased. We have no reason to disturb His Lordship's finding.

Ground (B): Absence Of Fingerprint And/Or DNA Evidence

[24] Learned counsel submitted that the prosecution should be faulted when the investigation officer or the forensic officer did not lift the finger prints or trace the DNA profile on the axe (exh. P13).

[25] With respect, we are unable to agree with the contention. In a case where the identity of the culprit is in question, fingerprint and/or DNA evidence would be of great significance. [See *PP v. Mansor Md Rashid & Anor* [1997] 1 CLJ 233; [1996] 3 MLJ 560, *PP v. Badrulsham Baharom* [1987] 1 LNS 72; [1988] 2 MLJ 535]

[26] In the present case, however, the identity of appellant as perpetrator of the crime was not in doubt. Furthermore, the appellant was seen carrying the axe before throwing it at the sofa. SP8 and SP10 also confirmed that the axe was found on the sofa.

[27] We could not find fault with His Lordship's finding on this ground.

Ground (C): The Confession Made To SP4 Is Inadmissible

[28] The appellant's statement to SP4 that he attacked the deceased is an important piece of evidence in this case. After having decided that the appellant made the statement voluntarily, the learned trial judge admitted that statement as a confession under s. 17(2) of the Evidence Act 1950.

[29] In our view, the learned trial judge rightly admitted the appellant's statement as a confession. The statement, taken as a whole without reference to extrinsic facts, suggest the inference that the appellant committed the offence. (See *Ho Sek Kong v. PP* [2011] 6 CLJ 522).

[30] The rule of prudence requires that there should be independent corroboration before there can be a conviction based on a confession (See *Hasibullah Mohd Ghazali v. PP* [1993] 4 CLJ 535; [1993] 3 MLJ 321, *Juraimi Husin v. PP* [1998] 2 CLJ 383; [1998] 1 MLJ 537.)

[31] The appellant was seen carrying the deceased's handbag and an axe. The deceased personal belongings were found on the appellant. He called SP4 almost 20 times asking SP4 to send him to Seremban 2. We take the facts and circumstances highlighted earlier as having the cumulative effect of bringing the irresistible inference that the accused had committed the murder.

[32] In *R v. Sang* [1979] 2 All ER 1222, the House of Lords held that a court has the power to exclude a confession if it is satisfied that its prejudicial effect outweighs its probative value. It has also been held that the party that is seeking to have the evidence excluded must show, on the balance of probabilities that the discretion should be exercised in its favour. (See *Francis Antonysamy v. PP* [2005] 2 CLJ 481; [2005] 3 MLJ 389).

[33] We are not impressed with the contention of learned counsel for the appellant that the prejudicial effect of the statement/confession outweighs its probative value. The learned judge has made a positive finding of fact that the appellant made the statement/confession voluntarily. It cannot be otherwise because the statement/confession was given by the appellant to his friend, SP4. Learned counsel for the appellant has failed to establish that the confession was involuntarily given. It is trite that findings of trial courts which are factual in nature and which involve credibility of witnesses are accorded respect where no glaring errors, gross misapprehension of facts and speculative, arbitrary and unsupported conclusions can be gathered from such findings. Moreover, as we have demonstrated earlier, there is ample evidence in the record to prove the guilt of the appellant independently of his confession.

Ground (D): Failure Of The Trial Judge To Appreciate The Defence Of Intoxication And/Or Grave And Sudden Provocation

[34] The defence of intoxication is spelt out in ss. 85 and 86 of the as follows:

> 85 (1) Save as provided in this section and in section 86, intoxication shall not constitute a defence to any criminal charge.
>
> (2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and:
>
> (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
>
> (b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.
>
> 86 (1) Where the defence under subsection 85(2) is established, then in a case falling under paragraph (a) thereof the accused person shall be acquitted, and in a case falling under para. (b), s. 84 of this Code and s. 347 and 348 of the Criminal Procedure Code shall apply.
>
> (2) Intoxication shall be taken into account for the purpose of determining whether the person charged formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.
>
> (3) For the purpose of this section and s. 85 intoxication shall be deemed to include a state produced by narcotics or drugs.

[35] In the instant case, the evidence showed that:

(a) the appellant had consumed a large quantity of alcohol; and

(b) The presence of a strong smell of alcohol.

[36] We are of the opinion that in the circumstances of the case, the appellant's defence of intoxication falls under s. 86(2) of the Penal Code. For the defence to succeed under that section,

A the appellant must be in such complete and absolute state of intoxication as to make him incapable of forming the intention as charged. (See *Abdul Aziz Mohamed Shariff v. PP* [2010] 5 CLJ 733; [2010] 6 MLJ 759, *Francis Anthonysamy (supra)*).

B **[37]** The learned counsel for the appellant attacked the prosecution's case for failure to subject the appellant to a toxicology test. We accept that scientific evidence to prove intoxication can be provided by an analysis of blood and urine samples which will show the level of alcohol in the body. C However, the blood alcohol level itself can never be conclusive to determine the degree of intoxication of a person. Different people react differently to the same alcohol. (See *Chan Kwee Fong v. PP*; [2010] 3 CLJ 671, *Francis Anthonysamy (supra)*). Therefore, in our view, the failure to subject the appellant to a toxicology test is not D fatal to the prosecution's case. What is important is that the appellant must convince the court that he was so drunk that he was incapable of forming the intention.

[38] The learned trial judge considered the appellant's conduct E immediately prior to and after the commission of the offence. Prior to the commission of the offence, the appellant rode from Kajang to Bukit Kepayang, then to Seremban 2 and finally back to the deceased's house at Mambau without getting involved in an accident. There was some distance between these locations. F To avoid getting injured or an accident, the appellant must be mentally alert. Further, he also remembered that the deceased had promised to lend him some money. It would be a fallacy that such mental state of mind would suddenly disappear when he attacked the deceased.

G **[39]** After the commission of the offence, the appellant took the deceased's handbag, attacked SP7 and called SP4 for help. Obviously, he had intended to escape. This could not have been conceived if he was intoxicated.

H **[40]** Under such circumstances, it is our considered view that the trial judge was not wrong when His Lordship rejected the defence of intoxication.

I

[41] The learned trial judge also considered and rejected the defence of provocation under exception one to s. 300 of the Penal Code. In discussing the test of grave and sudden provocation, the Supreme Court in *Lorensus Tukan v. PP* [1987] 1 LNS 150; [1988] 1 MLJ 251 stated that:

> It is for the court to decide in each case having regard to all the relevant circumstances. In order to succeed, the provocation must (a) be grave and sudden; and (b) have by its gravity and suddenness deprived the accused of the power of self-control.

[42] According to the appellant, the deceased was screaming at him repeatedly for his drinking habit. The deceased had uttered vulgar words insulting the appellant's daughter. The appellant told the court that he was angry but was able to keep his cool. Therefore, the deceased verbal attack cannot amount to a grave and sudden provocation to deprive the appellant of self-control.

Conclusion

[43] For the reasons aforestated, we found the appeal is bereft of merit. Based on the conspectus of the evidence, we cannot find any fault with the reasoning and conclusion of the learned trial judge. The case against the appellant was proved beyond reasonable doubt. We have no hesitation to agree with the findings of the learned judge holding the appellant guilty of offence under s. 302 of the Penal Code and the sentence imposed. Accordingly, the appeal fails and it is dismissed. The conviction and sentence passed by the High Court are affirmed.